Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
for Pricing Flexibility	)	WCB/Pricing 02-24
As Specified in Section 69.727	)	
Of the Commission's Rules	)	

COMMENTS OF
FOCAL COMMUNICATIONS CORPORATION,
PAC-WEST TELECOMM, INC., AND
US LEC CORP.

Pursuant to Section 1.774(c) of the Commission's rules, Focal Communications Corporation ("Focal"), Pac-West Telecomm, Inc. ("Pac-West"), and US LEC Corp. (together "Commenters"), by their undersigned attorneys, file these comments in opposition to the above-captioned request of BellSouth Telecommunications, Inc. ("BellSouth") for Phase I and Phase II pricing flexibility in various MSAs and non-MSA areas in several states within its service area.[1] The Commission should decline to process further applications for pricing flexibility because experience has shown that the Commission's current standards for pricing flexibility do not accurately identify when competition, rather than regulation, can constrain BOCs' ability to impose unreasonable terms and conditions on provision of interstate special access service.

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1 *Pleading Cycle Established for BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Public Notice, WCB/Pricing 02-24, DA 02-1925, released August 6, 2002. Phase I pricing flexibility permits ILECs to offer contract-based pricing, while maintaining generally available pricing for special access customers that do not have contracts. Under Phase II pricing flexibility, the ILEC's generally available prices are not subject to price caps or Part 69 rate structure rules.

I. EXCESSIVE RATES-OF-RETURN, RATE INCREASES, AND LACK OF COMPETITIVE ALTERNATIVES SHOW THAT PRICING FLEXIBILITY STANDARDS DO NOT CORRECTLY IDENTIFY COMPETITIVE MARKETS FOR PROVISION OF INTERSTATE SPECIAL ACCESS SERVICE SERVICE

In the *Pricing Flexibility Order*, the Commission established a framework that grants progressively greater pricing flexibility to ILECs subject to price cap regulation as competition develops while ostensibly assuring that these carriers may not use pricing flexibility to deter efficient entry, engage in exclusionary pricing behavior, or increase rates to unreasonable levels for customers that lack competitive alternatives.[2] The Commission established triggers for granting pricing flexibility that purportedly identify that market conditions in a particular area warrant this relief.

The three years since the *Pricing Flexibility Order* have shown that, in fact, the standards for pricing flexibility established in that decision do not accurately identify markets subject to competition. In fact, BOCs continue to possess the ability to maintain supra-competitive prices for interstate special access service, and are doing so, in those areas where they have qualified for pricing flexibility. The current rules have fallen seriously short of producing any substantial public interest benefits such as lower prices in response to competition.

Perhaps the most direct indication of BOC supra-competitive prices for interstate special access service is that they are achieving astronomically high rates-of-return. For 2001, BOC rates-of-return for interstate special access ranged from 20% to more than 50%.[3] These carriers would not be able to maintain these rates-of-return in a competitive environment. Almost by definition, rates-of-return at this level show that BOCs are not experiencing significant

2 Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 14 FCC Rcd 14221, 14225. (1999)"(*Pricing Flexibility Order*")

3 Letter From Robert W. Quinn, Jr., AT&T to Marlene J. Dortch, CC Docket No. 02-33, August 6, 2002.

competition in provision of interstate special access service. In a recent arbitration in Texas, an SBC employee stated that he had never experienced a situation in which SBC faced a competitive bidding situation in soliciting special access business from a customer.[4]

Moreover, in spite of excessive rates-of-return, BOCs are raising prices for interstate special access services. Commenters have recently described the wide-ranging price increases for key special access services that BellSouth instituted in the latter part of last year in areas where it has been granted pricing flexibility.[5] Commenters in the *Special Access Metrics Proceeding* have also described recent price increases in areas where BOCs have been granted Phase II pricing flexibility. The Ad Hoc Telecommunications Users Committee reviewed generally available prices for special access services and found that rates were higher in MSAs where Phase II pricing flexibility had been granted compared to other areas in the same state of the same density zone where Phase II pricing flexibility had not been granted.[6] This analysis revealed no instance of lower prices for generally available services in the MSAs in which Phase II pricing flexibility had been granted.[7] Ad Hoc demonstrated that prices are higher for a large number of pricing elements for DS1 and DS3 special access services in the supposedly more competitive Phase II MSAs. The fact that ILECs were able to raise prices shows the complete lack of competition in Phase II MSAs and the failure of the Commission's pricing flexibility rules to accurately identify areas subject to competition.

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[4] "I have not done any competitive bids to my knowledge." Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company, Texas Public Utilities Commission, Docket 25188, Deposition of Dwayne Cunningham at 104 (April 18, 2002).

[5] Joint Comments of Focal, Pac West, and US LEC, CCB/CPD File No. 01-27, filed December 14, 2001. *See also* Letter from Jim Brinkley, BellSouth Interconnection Services, to All Interexchange Carriers, Wireless Carriers and Competitive Local Exchange Carriers (Sept. 28, 2001), *available at* http://www.interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91082602.pdf (explaining that BellSouth was raising prices for special access service in areas where it had obtained pricing flexibility).

[6] Comments of the Ad Hoc Telecommunications Users Committee, CC Docket No. 01-321, filed January 22, 2202, at 4-5.

[7] *Id.* at 5.

Moreover, to the best of commenters experience, to the extent BOCs are offering discounts for interstate special access service pursuant to the Commission's pricing flexibility rules, they are not doing so in ways consistent with markets characterized by competition. In a competitive market, BOCs might be expected to offer price reductions in contract tariffs unalloyed with onerous terms and conditions. However, it appears to be the case that BOCs are only offering some discounts if the customer agrees to burdensome terms and conditions including unrealistic growth commitments combined with substantial penalties if the growth targets are not met. In a competitive market, carriers would not be able to demand growth commitments in exchange for limited pricing concessions of this sort.

Apart from excessive rates-of-return, rate increases, and lack of meaningful price reductions, the lack of competition in provision of interstate special access service is also shown by the practical experience of purchasers. That experience shows that there are few alternatives to BOC interstate special access service.[8] In fact, the New York Public Service Commission has found that Verizon remains the "dominant" provider of special access services in all of the state, including Manhattan, presumably one of the most competitive markets in the country.[9] Obviously, the lack of alternatives to BOC interstate special access service unequivocally demonstrates that the market for interstate special access service is not competitive.

The requirement that BOCs show one collocator using third party-provided transport is clearly a minimal showing of facilities-based competition. In 1999, the operating assumption and experience of the industry was that facilities-based providers would make rapid

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8 WorldCom Comments, CC Docket No. 321, filed January 2, 2002, at 5; Time Warner/XO Comments, filed January 2, 2002, CC Docket No. 01-321, at 4-5.

9 *Proceeding On Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Access Special Services Performance by Verizon New York Inc.*, Opinion and Order Modifying Special Services Guidelines for Verizon New York, Inc., Conforming Tariff, and Requiring Additional Performance Reporting, NY PSC Case No. 00-C-2051, released June 15, 2001, at 6.

progress in building out networks. In that environment, the minimal collocation and third party-provided transport test may have made sense because the degree of competition reflected by that test was viewed as merely the beginning of a tidal wave of facilities-based competition. In effect, the minimal requirements of the test made little difference, since it was the expectation that it would be rapidly exceeded in any event. In retrospect, however, it is clear that the optimism that formed the basis of that minimal test was unfounded. The deterioration of the competitive landscape has resulted in diminished availability of competitive alternatives for special access and dedicated transport, not the reverse. For this reason as well, it is clear that the current collocation triggers for pricing flexibility do not provide a meaningful assessment of markets subject to competition.

For all these reasons, the Commission should decline to process further applications for pricing flexibility for dedicated transport and special access service until it has recrafted standards for pricing flexibility that better identify competitive markets.

II. BELLSOUTH HAS FAILED TO DEMONSTRATE COMPLIANCE WITH EXISTING PRICING FLEXIBILITY STANDARDS

Apart from the inadequacies of current pricing flexibility rules, BellSouth has not in any event demonstrated compliance with them. Under the current tests for both Phase I and Phase II pricing flexibility, each wire center for which a price cap ILEC requests pricing flexibility must contain "at least one collocator that uses transport facilities owned by a provider other than the price cap LEC to transport traffic from that wire center."[10] In the *Pricing Flexibility Order*, the Commission determined that a price cap ILEC may rely on billing records to make its initial

[10] 47 C.F.R. Sec. 1.774(a)(3)(iii).

showing that one collocator per qualifying wire center is using third party transport.[11] For example, in approving an application of Verizon for pricing flexibility under these standards, the Bureau observed that Verizon had validated its data to ensure that collocators are still in operation.[12] Verizon extracted from its billing records monthly recurring charges for cable space and cable support structures in order to help demonstrate use of third party transport.[13] In addition, where billing records could not confirm whether collocators were using third party transport, Verizon physically inspected collocation facilities.[14]

However, in the present application BellSouth apparently did not rely on billing records at all, but only on "information" provided at the time of the "initial application" for collocation.[15] It states that its collocation records permit it to identify only those collocation arrangements where all make-ready work has been completed including installation of the third party-provided transport cable,[16] and that it relies on the same records to meet its network planning and reporting needs which, therefore, possess a "high indicia of reliability."[17]

While commenters do not believe that billing records demonstrate operability of third party transport, it is obviously the case that the initial collocation application, which could have been prepared as long ago as 1996 or even before, has no probative value as to whether the collocator is currently using third party transport. Similarly, the fact that BellSouth completed make-ready work, including installation of the third party transport cable, several years ago says nothing about what is happening now. The collocator could have cancelled the previous service

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11 *Pricing Flexibility Order*, 14 FCC Rcd at 14269.

12 *Petition of Verizon for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, CCB/CPD File No. 01-27, DA 02-706, released March 22, 2002, para. 12 ("*Verizon Pricing Flexibility Order*").

13 *Id.*

14 *Id.*

15 Petition for Pricing Flexibility for Special Access and Dedicated Transport Service, filed August 2, 2002 ("Petition"), at 4.

16 *Id.*

and started obtaining transport from BellSouth long ago for all that could be reasonably concluded from initial collocation applications. Billing records at least may show that a collocator is presently paying for charges associated with third party transport, but old collocation applications prove nothing about current use of third party transport. Nor, unlike Verizon, did BellSouth apparently make any effort to physically inspect collocation arrangements to ascertain the status of third party transport.

In the *Pricing Flexibility Order*, the Commission also stated that the petitioner should also serve each collocator with a copy of its petition and the associated information used to make its showing.[18] There is no indication from BellSouth's application that it provided any notice to collocators that BellSouth was relying on their alleged current use of third party transport.

Further, BellSouth's statement that the records it relied on for this application are the same ones that it uses for network planning and reporting is unconvincing. As noted, these are not apparently billing records as contemplated by the *Pricing Flexibility Order*. Further, BellSouth fails to explain how reliability of records for the purpose of "network planning" has any relevance to current operational status of third party-provided transport, or even what aspect of network planning they are used for. Moreover, BellSouth's and BOCs' network planning efforts are seriously deficient in a number of respects. There is no basis for assuming that BellSouth's network planning is particularly accurate or reliable, even assuming we knew what network planning it is talking about, or, consequently, that it produces reliable data for purposes of the present application. In any event, BellSouth's statement that its records "possess a high indicia of reliability" is meaningless. A statement that data has a high "indicia" of reliability is not on its face the same thing as stating that the data are, in fact, reliable. Therefore, BellSouth

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17 Petition at 5.

18 *Pricing Flexibility Order* at 14311.

has not even alleged, much less demonstrated that the records relied on in this petition are reliable, even assuming that they were otherwise probative of, or relevant to, the issue of whether collocators are using third party-provided transport.

In short, far from providing a convincing showing of third party-provided transport, BellSouth's showing on this point falls fall short of meeting the standards set forth in the *Pricing Flexibility Order* and as applied in previous applications for demonstrating that a collocator in each wire center is now using presently operational third party transport. Rather, BellSouth attempts to obtain pricing flexibility on the basis of a half-baked demonstration that does not comply with pricing flexibility rules and does no more than show based on old records that at some point a collocator may have intended to use third party-provided transport.

III. CONCLUSION

Accordingly, the Commission should reject the above-referenced application.

Respectfully submitted,

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